CUSTODIAN OF ENEMY PROPERTY v. K. VISVALINGA THAVER.

[C. A. (Brown, Storr and Whitton, JJ.) July 8, 1953]

[Singapore — Civil Appeal No. 9 of 1953]

Limitation Ordinance, Arts. 110 and 112 — Adverse possession of land.

This was an appeal against the judgment of Murray Aynsley, C.J. The facts were as follows:— In January 1933 the respondent was engaged by a Japanese to clear the forest from the land in question. He was paid no wages but by way of remuneration he was allowed to build a house and plant. He has remained on the land since that date paying no rent. Murray Aynsley, C.J. held that there was discontinuance by the Japanese and possession by the respondent since 1933 and that therefore in the circumstances the title of the Japanese was extinguished in 1945. The appellant appealed against this decision.

Held: although the respondent went on the land with the permission of the owner, when the owner discontinued possession the permission which was given ceased to operate and from that moment the respondent's possession became adverse.

Cases referred to:—

(1) *Hee Ann Hup v. Kolanthayan Chetty* 15 S.S.L.R. 249 at p. 253.

(2) *Leigh v. Jack* 42 L.T. 463.

(3) *Re Jolly* (1900) 2 Ch. at p. 619.

CIVIL APPEAL.

C. L. Duff for the appellant.

D. G. Osborne-Jones for the respondent.

Cur. Adv. Vult.

Brown, J. : — This is an appeal by the Custodian of Enemy Property who claims to be entitled under a vesting order made under the Trading with the Enemy Ordinance 1939, to the possession of a piece of land which was formerly owned by a Japanese named Mitsusuaki Honda. The respondent contends that he has enjoyed uninterrupted possession since 1933 and relies on the provisions of the Limitation Ordinance (Cap. 16).

At the trial it was agreed that the defendant (the present respondent) should begin, and he gave evidence that in January 1933 he was engaged by the Japanese to clear the forest from this land. He was paid no wages, but by way of remuneration he was allowed to build a house and plant. There he has remained since that date, paying no rent. He was not cross-examined; and the appellant called no evidence.

The first point which was argued on behalf of the appellant was that by the Limitation (Amendment) Ordinance, 1949, the period commencing 15th day of February 1942 and ending on the 30th day of September 1949 is required to be excluded in computing the 12 years period of limitation prescribed by the Schedule to the Limitation Ordinance. But the 1949 Ordinance is not expressed to operate restrospectively so as to deprive a person of a right which has vested in him, nor is it expressed to interfere retroactively with the operation of section 25 of the principal Ordinance. If in fact the period of limitation commenced to run in 1933, the right and title of the appellant to recover the property became extinguished in 1945, and the respondent acquired a title by prescription which the Ordinance enacted 4 years later cannot disturb.

The substantial point in this appeal is whether the respondent, having gone into possession with the permission of the Japanese owner, can have acquired a title by prescription. Mr. Duff, in his able argument on behalf of the appellant, contends that whether the respondent relies on Article 110 or Article 112 of the Schedule to the Limitation Ordinance he must shew adverse possession, and that his possession cannot have been adverse because he went in with the owner's permission.

I have no doubt that the material Article is 110. The Japanese owner was in possession at the time when he allowed the respondent to enter, and he discontinued possession. The respondent's case is that although he went into the land with the permission of the Japanese owner, the owner then left and discontinued his possession, since when nothing has been heard of him, and that by Article 110 the time begins to run from the date of discontinuance.

Now Article 110 is modelled on section 3 of the Real Property Limitation Act 1833, as was pointed out in *Hee Ann Hup v. Kolanthayan Chetty*[1]. That section provided that, in a case of discontinuance of possession, the right to bring an action to recover the land shall be deemed to have first accrued when the person claiming discontinued his possession. But Mr. Duff says that no right of action accrues unless the possession of the respondent is "tortious." Section 3 of that Act does not say that. But Mr. Duff relies on a passage from the Judgment of Bramwell L.J. in *Leigh v. Jack*[2]. Relying on that passage, Mr. Duff says that there can be no adverse possession unless the respondent's possession was tortious, and although there was a discontinuance by the Japanese the possession could not be tortious because the respondent went in with the owner's permission. It seems to me, however, that the learned Lord Justice was distinguishing between two cases for which the statute of 1833 provides — the first a case where the possession is "tortious", and the second a case where the defendant takes possession upon a discontinuance by the true owner. In both cases the possession is "adverse." And in both cases the owner must assert his rights within the statutory period. I take the former case to be where a defendant

is a trespasser against the will of the owner; and the latter to be where the defendant is in possession of the land after the owner has abandoned it. Thus Collins L.J. in *Re Jolly*[3] said: "the effect of the statute of William IV was to do away with non-adverse possession, and to make all possession adverse." And in section 10(1) of the Limitation Act 1939 "adverse possession" was statutorily defined and includes a case of discontinuance under section 5(1) of that Act. Therefore, unless the owner's permission continued to operate after he had discontinued I think that the respondent in the present case was in "adverse" possession of this land from the time when the owner abandoned it, because at any time within the period of limitation the owner could have exercised his rights.

But Mr. Duff relies on the fact that the respondent's possession commenced with the owner's consent, and says that his possession continues to be permissive until something occurs to make it adverse, the onus being on the respondent to prove how and when it became adverse (*Rustomji Vol. II p. 1387, 5th Edition*). I think that his possession became adverse when the owner discontinued, and that the owner's right of action first accrued then. I accept the finding of fact that there was a discontinuance of possession by the Japanese in 1933. Very little would have been sufficient to shew a continuance of possession, but here there was nothing. The plaintiff called no evidence. Then accepting the fact of discontinuance in 1933, it seems to me that if we were to hold that the permission which was granted when the owner was in possession continued to operate after he had abandoned possession, that would be inconsistent with the fact of discontinuance, because if the respondent continued to occupy the land with the owner's permission the owner was equally in possession. And this state of affairs could continue till the end of time. "*Vigilantibus, non dormientibus, jura subveniunt.*" I cannot think that the permission granted in 1933 (as a remuneration for services then rendered) can operate to preserve the owner's rights indefinitely without any step being taken by him to assert them within the statutory period of limitation. In my opinion, when the owner discontinued possession the permission which he had given to the respondent ceased to operate, and from that moment the respondent's possession became adverse.

I would dismiss the appeal with costs.

Storr and Whitton, JJ. concurred.

Appeal dismissed.

Re SYED HASSAN BIN ABDULLAH ALJOFRI, DECD.; SYED HAMID BIN HASSAN ALJOFRI v. SHARIFAH SALMAH BINTE ABDULLAH ALHABSHI & ANOR.

[O. C. J. (Storr, J.) July 22, 1953]

[Muar — Civil Suit No. 12 of 1948]

Executors and Administrators — Executor's claim against Testator's estate — Rule in "Strong v. Bird" — Onus of proof required to establish claim.

The plaintiff who was one of the executors of the deceased's estate claimed that the deceased had made a gift to him of a piece of land during his lifetime. He also claimed that the house standing on this land and in which he has been staying was built with moneys belonging to him. His Counsel relied on the principle in **Strong** v. **Bird**[1] that "where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the executor is entitled to hold the property for his own benefit." That principle applies also to real estate.

Held: to succeed in this case the plaintiff had to prove that there was on the part of the deceased a present intention to make an immediate gift and that such intention survived until the date of the deceased's death. While it is not a principle of law that there must be corroboration in proving the claim against the estate of a person who is dead, the claimant must prove his case against the estate clearly and convincingly. From the evidence, the plaintiff has not discharged the onus upon him to prove that there was a valid gift of land to him by the deceased.

Cases referred to:—

(1) *Strong v. Bird* L.R. 18 Eq. 315.

(2) *In re Finch* (1883) 23 Ch. 267 at pp. 276 — 277.

(3) *In re Garnett* (1886) 31 Ch. 1 at pp. 8 — 9.

(4) *In re Pink* (1912) 2 Ch. 528 at 536.

(5) *Jackson v. Rodger* (1952) 1 All E.R. 16 at 19.

TRIAL OF ISSUE.

K. E. W. Hatchard for the plaintiff.

N. A. Mallal for the defendants.

Cur. Adv. Vult.

Storr, J.: — The issue ordered to be tried by the Judge in the order dated 5th July, 1952, was as follows:—

"The abovenamed Syed Hamid bin Hassan Aljofri affirms and the abovenamed Sharifah Salmah binte Abdullah Alhabshi and Syed Abdullah bin Hassan Aljofri (Infant) by his next friend Syed Ahmad bin Abubakar Alhabshi do not admit that the land and premises described in the Schedule hereto is the property of the said Syed Hamid bin Hassan Aljofri beneficially . . . ."

THE SCHEDULE ABOVE REFERRED TO

All that piece of land (hereinafter referred to in this judgment as the land) recorded under Surat Sementara No. 56/23 Lot 1182 covering an area of 2 acres